NO. 88-258

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,

Petitioner,

VS.

AMERICAN STORES COMPANY,
ALPHA BETA STORES, INC.,
LUCKY STORES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

BRIEF OF 29 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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September 11, 1989

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INTRODUCTION

The States of Alabama, Alaska, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming (hereinafter "Amici States") submit this brief in support of the State of California's Petition for a Writ of Certiorari.

INTEREST OF THE AMICI STATES

The Attorneys General of the Amici States are charged by law with the duty of enforcing both state and federal antitrust laws, including Section 7 of the Clayton Act. The Amici States play a major role in federal antitrust enforcement. The States were actively protecting our system of free enterprise before the federal government had antitrust enforcement authority. Twenty-one states had adopted their own antitrust statutes by the time the Sherman Act was enacted. *California v. ARC America Corporation*, ____ U.S. ____, 109 S.Ct. 1661, 1665 n.4 (1989). Many of these statutes include explicit provisions requiring them to be construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[1] In other states, local courts have adopted federal precedent to promote uniform law.[2] The Amici

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[1] *See, e.g.*, Tex. Bus. & Com. Code § 15.04 (1989) (to the extent consistent with the purpose of maintaining and promoting economic competition in trade and commerce and to provide the benefits of such competition to consumers in Texas); Wash. Rev. Code § 19.86.920 (1985).

[2] *See, e.g., Minnesota v. Duluth Bd. of Trade*, 107 Minn. 506, 121 N.W. 395 (1909).

States, therefore, have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional intent, this Court's past decisions, and sound public policy.

The Amici States support the State of California's contention that divestiture is a remedy available to private plaintiffs under Section 16 of the Clayton Act. In *California v. American Stores*,[3] the Ninth Circuit held that divestiture is not available as a remedy to California as a private plaintiff. In so holding, the Ninth Circuit weakened antitrust law and perpetuated a split among the circuits.

SUMMARY OF ARGUMENT

American Stores offends public policy and is contrary to the clear intent of Congress. In denying the divestiture remedy to the State of California, the Ninth Circuit draws an untenable distinction between the remedies afforded private and public plaintiffs. The distinction is especially arbitrary when one considers that the so-called "private" plaintiff in this case is a state, representing public rather than private interests.

This Court has not considered the issue of whether divestiture is a remedy available to states and private parties. At the appellate and district court levels, conflicts on the divestiture remedy issue exist in abundance. Because the circuits are in direct conflict on this issue and because of the public policy implications of the *American Stores* decision, this Court should grant the Petition of Certiorari filed herein by the State of California.

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[3]*California v. American Stores Co.*, 872 F.2d 837 (9th Cir. 1989), *petition for cert. filed*, (U.S. August 10, 1989) (No. 89-258).

ARGUMENT

I. THE HOLDING IN *AMERICAN STORES* SEVERELY LIMITS THE EFFICACY OF PRIVATE ENFORCEMENT UNDER THE CLAYTON ACT, CONTRARY TO THE CLEAR INTENT OF CONGRESS.

Section 7 of the Clayton Act prohibits the acquisition of stock or assets where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Sections 4 and 16 of the Clayton Act provide for private rights of action. "[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S. Ct. 1562, 1580 (1969).

The Ninth Circuit's decision in *American Stores* severely weakens the right of action granted to private parties under the Clayton Act. In *American Stores*, the Court of Appeals held that "divestiture, whether direct or indirect, is not an available form of relief under Section 16 for a private party such as California." 872 F.2d at 845. Thus, the states and private plaintiffs have been denied the remedy this Court has recognized as "the most important of antitrust remedies." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961). "[Divestiture] should always be in the forefront of a court's mind when a violation of § 7 has been found." 366 U.S. at 331, 81 S.Ct. at 1253.

Without the remedy of divestiture, the states and private plaintiffs are effectively precluded from enforcing Section 7 of the Clayton Act. Frequently, as

in the *American Stores* case, it is not feasible for a state or private party to file suit before a merger is consummated. The "symptomatic" remedies permitted by the Ninth Circuit in such cases cannot correct the harm produced by illegal mergers.

Congress clearly did not intend such a result when it granted a right of action to private parties. "Courts have long recognized that Congress intended private antitrust suits both to provide a remedy to injured parties. . .and to enlist the business public as private attorneys general to aid the government in 'achieving the broad social object of the statute.'" *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 415 (1st Cir. 1985) (citation omitted). The significance Congress placed upon the private plaintiff injunctive remedy is reflected by the following statement made during consideration of the Clayton Act:

> First, we found that the Sherman law did not permit an injunction on petition of an individual. The Government could enjoin a combination or trust; and though an individual was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So. . .the committee, proposed to place in this bill a law which allows the individual to sue for equitable relief and to enjoin monopoly when he is threatened with irreparable loss or damage.

51 Cong. Rec. 9270 (daily ed. May 26, 1914) (statement of Rep. Carlin).

As a matter of public policy, private parties play an important role in enabling judicial review of potentially anticompetitive mergers or acquisitions. The federal government alone cannot adequately enforce the Clayton Act. Its resources are limited. Furthermore, prosecutorial discretion allows the federal government to proceed or not proceed at will as it chooses.

> Where the government fails to enforce certain antitrust laws, private actions can assure that violations of these laws are brought before the courts. In this way, private litigation serves to further the development of the antitrust laws. In creating a private right, Congress necessarily intended private parties to play this vital role. Courts should not allow the government agencies alone to determine, through their enforcement policies, the substance of antitrust law.

Note, *Divestiture as a Remedy in Private Actions Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579, 1595 (1986) (footnotes omitted).

State attorneys general play a special role in this enforcement scheme. Many are charged under their respective state laws with the same powers and responsibilities granted by federal law to the Federal Trade Commission ("FTC") and the United States Department of Justice. Additionally, state attorneys general are particularly well suited to investigate and prosecute mergers with predominantly local impact, given their knowledge of local business conditions and their responsibility to the citizens of their states. Congress recognized the special role state attorneys general should play in antitrust enforcement when it

granted the state attorneys general *parens patriae* authority in Section 4C of the Clayton Act, 15 U.S.C. § 15c.

The Ninth Circuit seemed to recognize the difficulty created by its decision but claimed that its holding does not place the states and private plaintiffs in "an untenable position," since suit may be filed before a stock sale has been completed. 872 F.2d 846. States and private plaintiffs, however, do not always have access to the information necessary to analyze mergers before the mergers are completed. For example, state attorneys general are not permitted access to Hart-Scott-Rodino filings directly from the federal government. *Lieberman v. FTC*, 771 F.2d 32, 37-38 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985).[4]

Even if essential information is available, the analysis required to determine whether or not a merger should be challenged is simply too complicated to be accomplished within the narrow "window of opportunity" established by the Ninth Circuit in *American Stores*. As a matter of public policy, antitrust law should not require suit before the time when filing is "responsibly possible." Indeed, the Ninth Circuit's holding often will unfairly force private plaintiffs to weigh the threat of sanctions against the loss of their only effective remedy, divestiture. *See* Fed. R. Civ. P. 11. Moreover, the decision forces private and state plaintiffs to act prior to completion of any federal review process. Cooperation between state and federal

[4]Although many states have the power under their statutory law to obtain documents from the merging parties, *see, e.g.*, Tex. Bus. & Com. Code § 15.10, such pre-complaint discovery power is often too slow in the fast-paced world of mergers. Private parties other than states do not have such subpoena power.

law enforcement authorities should be encouraged by the courts, not discouraged.

The facts in the instant case demonstrate the difficulties created by the Ninth Circuit's decision. The district court found that California had "conducted this investigation as swiftly as was responsibly possible." *American Stores*, 697 F. Supp. 1125, 1135 (C.D. Cal. 1988), *rev'd*, 872 F.2d 837 (9th Cir. 1989), *petition for cert. filed*, (U.S. August 10, 1989) (No. 89-258). The district court also found that California was participating in the "premerger" review procedure established by Hart-Scott-Rodino Act. 697 F. Supp. at 1135. California submitted comments to the FTC analyzing the merger and recommending that the FTC withdraw its proposed consent agreement. *Id.* The district court found that it was not "unreasonable for the State to have refrained from filing suit prior to even preliminary FTC approval." *Id.*

The record reveals that the FTC approved the merger in the instant case on August 31, 1988, and California filed suit the next day. *Id.* To accept the Ninth Circuit's assertion that "California could have sued several months earlier and attempted to enjoin the merger", 872 F.2d at 846, one must acknowledge that California would have had to do so without regard for the FTC review. By participating in the FTC review, California was attempting to protect competition for its citizens, while also cooperating with the federal government. The Ninth Circuit's decision prevents such cooperation in the future.

II. *AMERICAN STORES* IRRECONCILABLY CONFLICTS WITH CIRCUIT COURT PRECEDENT, FRUSTRATING THE STATES' ABILITY TO EFFECTIVELY PROTECT THEIR CITIZENS AGAINST THE THREATS POSED BY UNLAWFUL MERGERS.

At the appellate and district court levels, conflicts on the divestiture remedy issue exist in abundance. In *American Stores*, the Ninth Circuit held that divestiture is not a remedy available to the State of California as a private plaintiff. 872 F.2d at 845. The *American Stores* court cited earlier Ninth Circuit precedent holding that "divestiture is not an available remedy in private actions under Section 16 of the Clayton Act." *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975); *see also Bosse v. Crowell Collier & Macmillan*, 565 F.2d 602, 607 (9th Cir. 1977); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). Several other courts have also held that the divestiture remedy is not available to private parties. *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050, 1060 (6th Cir.), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 510 (1984); *Pretz v. Holstein Friesian Ass'n of America*, 698 F. Supp. 1531, 1536-37 (D. Kan. 1988); *Mr. Frank, Inc. v. Waste Management, Inc.*, 591 F. Supp. 859, 865 (N.D. Ill. 1984).

In direct conflict, the United States Court of Appeals for the First Circuit and several other courts have held that the divestiture remedy is available to private plaintiffs under Section 7. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 406, 413-30 (1st Cir. 1985); *Consolidated Gold Fields, PLC v. Anglo American Corp.*, 1989-1 Trade Cas. (CCH)

¶ 68,536 (S.D.N.Y. 1989); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1255-56 (E.D. Pa. 1987); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp 780, 797 (S.D. Tex. 1971), *aff'd on other grounds*, 476 F.2d 989 (5th Cir. 1973).

This Court has not considered the issue of whether divestiture is a remedy available to states and private parties. The Amici States respectfully maintain that California's Petition for Certiorari should be granted to resolve the conflicts which exist among the lower courts. Such a review is now more important than ever. Mergers and acquisitions are taking place at an unprecedented rate, yet the government resources devoted to investigating and prosecuting such mergers have dwindled. The availability of the private plaintiff divestiture remedy is essential to effective Clayton Act enforcement, necessary for sound public policy, and consistent with congressional intent.

CONCLUSION AND PRAYER

For the foregoing reasons, the State of California's Petition for Certiorari should be granted.

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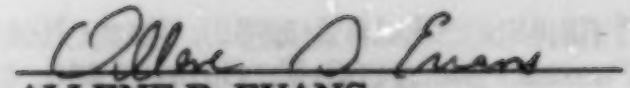

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